United States of America

Before the

Department of Commerce

WEAVER'S COVE ENERGY, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

MILL RIVER PIPELINE, LLC,

Appellant,

v.

MASSACHUSETTS OFFICE OF COASTAL ZONE MANAGEMENT,

Respondent.

AMICUS CURIAE BRIEF OF THE CITY OF FALL RIVER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES, REGULATIONS & RULES

LEGISLATIVE HISTORY

STATE REGULATIONS

ADMINISTRATIVE DECISIONS

STATEMENT OF THE CASE

This appeal arises out of a proposal by Weaver's Cove Energy, LLC ("Weaver's Cove") to construct and operate a liquefied natural gas ("LNG") import terminal on the Taunton River in Fall River, Massachusetts (the "Project"). The Project would be serviced by two natural gas pipelines that would be constructed by Mill River Pipeline, LLC ("Mill River"), an affiliate of Weaver's Cove, and it includes an LNG storage tank, vaporization equipment, an LNG truck distribution facility, as well as the replacement of a pier and the stabilization of waterfront at the proposed site. WCE A-1; MRP A-1.[1] In addition, Weaver's Cove proposes to dredge extensive portions of Mount Hope Bay and the Taunton River to allow LNG tankers to deliver LNG to the proposed terminal. *Id.* A portion of the Project site, excluding where the pipeline crosses the Taunton River, is located at the edge of a Designated Port Area, which area sits between Narragansett and Mt. Hope Bays, an estuary of national significance as designated by the U.S. Environmental Protection Agency ("EPA"), and the upper Taunton River, a study area under the federal Wild and Scenic River Act administered by the U.S. Department of Interior ("DOI").

In connection with the Project, Weaver's Cove and Mill River are required to obtain numerous federal and state permits, licenses and certifications. Accordingly, the Project was subject to review under both the National Environmental Policy Act ("NEPA") and the Massachusetts Environmental Policy Act ("MEPA").[2] As the lead federal agency, the Federal Energy Regulatory Commission ("FERC") initiated NEPA review of the Project in 2003, including preparation of the various environmental impact statements required by NEPA. FERC

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[1] Citations to the record (included within the parties' appendices) follows the form used in the principal briefs: WCE A-__ for Weaver's Cove's initial appendix; MRP A-__ for Mill River's initial appendix; MCZM SA-__ for the State's supplemental appendix; WCE SA-__ for Weaver's Cove's supplemental appendix; and MRP SA-__ for Mill River's supplemental appendix.

[2] Upon request by Weaver's Cove, the Secretary of the Commonwealth of Massachusetts Executive Office of Environmental Affairs ("EOEA") agreed to coordinate its review of the Project with Federal Energy Regulatory Commission's ("FERC") review under NEPA.

published its Final Environmental Impact Statement ("FEIS") in May 2005, and thereafter issued a conditional approval on July 15, 2005 (the "Conditional Order"). *See Weaver's Cove Energy, LLC and Mill River Pipeline, LLC*, 112 FERC ¶ 61,070 (July 15, 2005), WCE A-3; MRP A-4, *order on reh'g*, 114 FERC ¶ 61,058 (Jan. 23, 2006) ("Rehearing Order"), WCE A-4; MRP A-5, *rev. denied by, Fall River v. Fed. Energy Regulatory Comm'n*, 507 F.3d 1, 7 (1st Cir. 2007) (review unripe because "WCE's proposed LNG project may well never go forward because FERC's approval of the project is expressly conditioned on approval by the USCG [United States Coast Guard] and the DOI [United States Department of Interior]"). Many significant conditions precedent to operation of FERC's Conditional Order have not been fulfilled, and may never be fulfilled.

After completing review under NEPA and MEPA and while various permits and approvals were still being considered by state and federal agencies, Weaver's Cove and Mill River each submitted a final Federal Consistency Certification to the Massachusetts Office of Coastal Zone Management ("MCZM" or "Respondent") on January 4, 2007. WCE A-1; MRP A-1; *see* 16 U.S.C. § 1456(3)(A); 15 C.F.R. Pt. 930; 301 CMR 21.00 *et seq*. As described by MCZM in its brief, in the absence of a stay, MCZM objected to the Federal Consistency Certifications on the basis that Weaver's Cove and Mill River had not provided to MCZM several state licenses and permits necessary to document compliance with state enforceable policies, which, under Massachusetts' approved Coastal Zone Management Plan, were required. WCE A-18; MRP A-2.

On August 27, 2007, the same day it filed suit against DOI with respect that agency's refusal to issue a concurrence required by the Conditional Order, both Weaver's Cove and Mill River filed Notices of Appeal with the Secretary of Commerce seeking an override of MCZM's objections to the Federal Consistency Certifications for the Project. The City of Fall River ("Fall

River") sought intervention, which was denied without prejudice to seek leave to file an amicus brief.

STATEMENT OF FACTS

Although FERC granted the requested certificates finding the project would aid in meeting a growing demand for natural gas, it recognized that "[i]n addition to the considerable public opposition to the project, most of the federal and state resource agencies with a permitting or advisory role in the project have significant concern about the project's dredging-related impacts on water quality and fisheries habitat in Narragansett Bay, Mt. Hope Bay, and the Taunton River." Conditional Order at ¶ 106.[3] As a result, and in recognition of the expertise of the federal and state resource agencies, FERC imposed a number of conditions related to the environmental impacts of dredging, which remain unfulfilled and outstanding. *See* Conditional Order, Condition Nos. 18, 19, 20, 21, 23, 24, 25; Rehearing Order at ¶¶ 108-109.[4]

Among the outstanding environmental conditions that preclude operation of the Conditional Order is the concurrence from the DOI under the Wild and Scenic River Act, 16 U.S.C. § 1271 *et seq.*, required by Condition No. 25. Weaver's Cove unsuccessfully urged FERC to remove the condition. FERC declined, finding "the types of activities covered by the Wild and Scenic Rivers Act are within the province of DOI to resolve." *See* Rehearing Order at

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[3] On rehearing, FERC again repeated its understanding that "the primary concern of EPA, NOAA Fisheries, and the Massachusetts DEP with the project is the proposed dredging, which they believe will result in substantial and unacceptable impacts on water quality and fisheries habitat in Narragansett Bay, Mt. Hope Bay, and the Taunton River." Rehearing Order at ¶ 18.

[4] Among the environmental conditions is the requirement that "Weaver's Cove shall file ... documentation of concurrence from the Office of Coastal Zone Management that the project is consistent with the Massachusetts Coastal Zone Management Program." Conditional Order, Condition No. 23. Similarly, Weaver's Cove is required by Condition No. 24 to obtain concurrence from the Rhode Island Coastal Resources Management Council ("CRMC"). Weaver's Cove objected to this condition in its rehearing request. FERC refused to remove this condition. *See* Rehearing Order at ¶¶ 122-128. Rather than seek an appeal of FERC's refusal, Weaver's Cove filed suit against the CRMC to avoid compliance with Rhode Island's coastal management plan and to seek a declaration that CRMC's concurrence with Weaver's Cove's Consistency Certification be conclusively presumed, among other things. *See Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council et al.*, United States District Court for the District of Rhode Island, Case No. 07-246-S (pending).

¶¶ 116-120. In addition to the FERC condition, the Army Corps of Engineers ("Army Corps") also requires concurrence from DOI before issuing dredging permits. *See* 33 C.F.R. § 320.4(e); Responses to Comments, Review of Public Interest Factors and Compliance with Section 404(b)(1) Guidelines (May 17, 2006), WCE SA-7 at 65. To date DOI has not provided that concurrence, and, in fact, has indicated that it will not do so based on the dredging proposal proffered by Weaver's Cove and reviewed in the FEIS. *See* SA-7 at 16 (referring to USFWS [DOI agency] February 7, 2006 comment letter seeking extended time-of-year restrictions).

Rather than "pursue its arguments with DOI" as suggested by FERC, Rehearing Order at ¶ 120, Weaver's Cove filed suit against DOI in the United States District Court for the District of Columbia, Case No. 1:07-cv-01525 (RBW), challenging the authority of DOI to issue the July 5, 2005 letter to FERC and the February 7, 2006 letter to the Army Corps. Specifically, Weaver's Cove alleged:

> The DOI's determinations impose actual, immediate injury on Weaver's Cove. The DOI's determinations in this case have, and were intended to have, the effect of preventing Weaver's Cove from: (a) fulfilling the conditions of FERC's approvals; and (b) obtaining a permit from USACE to perform the necessary dredging of a federal navigational channel to permit LNG vessels to deliver LNG to the FERC-approved terminal. ***The relief requested in this Complaint is indispensable if Weaver's Cove is ever to be able to satisfy the conditions of the FERC orders approving the project and to obtain necessary permits and licenses, including the USACE permit.***

Complaint for Judgment and Relief Pursuant to the Declaratory Judgment Act and the Administrative Procedure Act filed August 27, 2007, at ¶ 8 (emphasis supplied). DOI denies the allegations and has filed a motion to dismiss. The litigation is pending.

Next, "as conditioned in the July 15 Order, Weaver's Cove must obtain clean water and dredging permits from the state and COE, respectively." Rehearing Order at ¶ 115. As described by MCZM, Massachusetts' approved coastal management program requires that the applicant submit all outstanding permits, licenses, and certifications before concurring to federal

consistency. *See* 301 CMR 21.07(3)(f). A 401 water quality certification with respect to dredging was among the approvals lacking for both Weaver's Cove and Mill River (which pipeline installation required dredging) at the time MCZM objected to federal consistency.

Rather than complete the permitting process with Massachusetts and Rhode Island, however, Weaver's Cove again has resorted to litigation in an effort to avoid the environmental requirements of the Conditional Order. Specifically, Weaver's Cove filed separate actions against the Massachusetts Department of Environmental Protection ("MassDEP") and the Rhode Island Department of Environmental Management ("RI DEM") in the Court of Appeals for the District of Columbia Circuit seeking a declaration that the respective agencies waived their rights to issue 401 water quality certifications with respect to dredging under the federal Clean Water Act due to alleged delay in agency action. Those consolidated proceedings are currently pending as Docket Nos. 07-1235 and 07-1238. Fall River was granted intervention in those proceedings.

The Conditional Order also imposed several conditions with respect to required mitigation related to dredging, including imposition of time-of-year restrictions on dredging as required by state and federal resource agencies, and compensatory mitigation for temporary and permanent impacts to (a) intertidal habitat from filling 0.56 acres to construct the bulkhead, (b) 84 acres of mapped shellfish habitat, and (c) 11 acres of winter flounder spawning habitat. *See* Conditional Order at ¶¶ 106-109, Condition Nos. 19, 20, 21; Rehearing Order at ¶¶ 11, 18-19, 29, 115. Although Weaver's Cove has made proposals with respect to these matters, to date they have not been accepted by the applicable resource agencies.[5]

[5] For example, Condition No. 20 states: "Weaver's Cove shall complete the coordination with applicable federal and state resource agencies regarding development and funding of mitigation measures to offset impacts on quahogs resulting from dredging of the turning basin and file the results of that coordination, ***including copies of agency approval***, ..."

In addition, the Conditional Order also recognized the jurisdiction of the USCG with respect to the maritime safety and security aspects of the Project, and required USCG approval of the waterway for LNG tanker traffic. *See* Conditional Order at ¶¶ 85-86; Rehearing Order at ¶ 112 (FERC defers to Coast Guard authority over vessel security, navigation safety, and all matters pertaining to the safety of facilities or equipment located in or adjacent to navigable waters and thus the LNG terminal project requires Coast Guard approval).

Lastly, FERC imposed a number of conditions related to safety, security and emergency response. *See* Conditional Order at ¶¶ 95-99. Recognizing that "there remain a number of issues concerning the viability of emergency evacuation that have not yet been satisfactorily resolved," these conditions, like the environmental conditions concerning dredging, require approval of federal (USCG), state and local law enforcement and emergency response officials before the Project can proceed. *Id.* at ¶ 98; Rehearing Order at ¶ 99 ("issues raised by Fall River will need to be satisfactorily addressed in the Emergency Response Plan that is filed for our review and approval"); *see also Weaver's Cove Energy, LLC and Mill River Pipeline, LLC*, 112 FERC ¶ 61,070 (July 15, 2005) (Commissioner Kelly dissent at pp. 3-5, "there are serious impediments to the development of a viable, effective Emergency Response Plan and evacuation plan in the area"). As described herein, to date these conditions have not been met.

Moreover, events subsequent to the issuance of the FEIS and FERC's Conditional Order "could very well affect WCE's final project approval." *Fall River,* 507 F.3d at 5. First, as a result of federal legislation passed subsequent to the FERC's Conditional Order, the suitability of the waterway for LNG tanker traffic was seriously questioned, and has subsequently been determined to be unsuitable. *Id.* at 7; *see* U.S. Coast Guard, Weaver's Cove Letter of

Recommendation, Oct. 24, 2007.[6] Second, DOI doubts that it could provide the "statutorily required affirmative statement of no adverse impact" to the Taunton River. *Fall River*, 507 F.3d at 7. FERC's Conditional Order specifically contemplated that the Project could not proceed without the USCG and DOI approvals, among others.

SUMMARY OF ARGUMENT

Weaver's Cove's and Mill River's requests for Secretarial overrides of MCZM's objections to federal consistency should be denied because they cannot meet their burden of proving the Project is consistent with the objectives or purposes of the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 et seq., or that the Project is necessary in the interest of national security. Because they cannot satisfy necessary conditions precedent, including securing approval from the USCG for the maritime aspects of the Project and concurrence from DOI that the Project will have no adverse impact on the Taunton River's potential designation as a Wild and Scenic River, among others, the FERC Conditional Order is not "effectuated" and reliance on FERC's "public interest" finding is misplaced. In addition, appellants cannot demonstrate compliance with the myriad environmental conditions precedent contained in the Conditional Order, and thus cannot demonstrate that any purported benefits of the Project outweigh the adverse coastal impacts of the Project. Lastly, neither the U.S. Department of Defense nor the U.S. Department of Energy assert that the Project in necessary for national security, and the Appellants are otherwise unable to satisfy this statutory requirement.

[6] By decision dated January 2, 2008, this document was made a part of the decisional record.

ARGUMENT

I. APPELLANTS CANNOT SHOW THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OR PURPOSES OF THE CZMA.

An override of MCZM's objections to the Federal Consistency Certifications is inappropriate in this case because Appellants have failed to demonstrate that the Project is consistent with the objectives or purposes of the CZMA.

For the Secretary to override an objection by a state agency, the appellant bears the burden of demonstrating by a preponderance of the evidence that the activity is consistent with the objectives or purposes of the CZMA. 15 C.F.R. §§ 930.121, 930.127(f); *see also* Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Company, LLC ("Islander East Consistency Decision"), May 5, 2004, at 35 (preponderance of the evidence); Decision and Findings of the U.S. Secretary of Commerce in the Drilling Discharge Consistency Appeal of Mobil Oil Exploration & Producing Southeast, Inc. ("Mobil Oil Consistency Decision"), Sept. 2, 1994, at 8 ("the Appellant bears the burden of proof and the burden of persuasion"). An activity is consistent with the objectives or purposes of the CZMA only if it satisfies three requirements:

> (a) The activity furthers the national interest as articulated in § 302 or § 303 of the [CZMA], in a significant or substantial manner,
>
> (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively, [and]
>
> (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program.

15 C.F.R. § 930.121. "A negative finding for *any* of the three elements will preclude [a] project from being consistent with the objectives of the CZMA." Decision and Findings by the U.S.

Secretary of Commerce in the Consistency Appeal of Millennium Pipeline Company, L.P. ("Millennium Pipeline Consistency Decision"), Dec. 12, 2003, at 21.

To sustain its burden, the applicant must provide sufficient information from the decision record that supports the conclusion that the proposed project satisfies the statutory criteria. *See* 15 C.F.R. § 930.130(d). The Secretary may find that a proposed project satisfies either Ground I or Ground II only "when the information submitted supports this conclusion." *Mobil Oil Consistency Decision*, at 8 (quoting Decision and Findings of the U.S. Secretary of Commerce in the Consistency Appeal of Shickrey Anton ("Anton Consistency Decision"), May 21, 1991, at 3 (quoting 15 C.F.R. § 930.130(a))). Generally, where the likelihood or extent of the impacts of a proposed project may be high, as in this case, more information is necessary. *Id.* at 10. Where the record contains insufficient evidence that the proposed project satisfies either of the statutory grounds, the Secretary will not override a State's objection. *Id.* at 8.

Here appellants cannot demonstrate compliance with the Conditional Order and therefore cannot rely upon FERC's "public interest" finding to support their claim that the Project furthers a national interest in a significant or substantial manner. Likewise, Appellants' reliance upon FERC's findings in the FEIS that environmental impacts can be offset by mitigation is misplaced where numerous federal and state resource agencies have not agreed, and the Project has not, and cannot, comply with the Conditional Order. Appellants' resort to litigation over Clean Water Act compliance, and the application of the Wild and Scenic River Act and the CZMA, as described *infra*, is telling. Because Weaver's Cove is unable to satisfy the FERC conditions, or demonstrate that the Project complies with state enforceable policies, it has resorted to litigation to impose its view. Lastly, Weaver's Cove's argument that the USCG decision denying it vessel access to the Project site is irrelevant to the Secretary's consideration defies credibility. *See*

WCE Reply Br. at 5-6 ("safety is not part of Element 1 review" regarding whether the Project furthers the national interest in a significant or substantial manner).[7]

A. The Project Fails to Further the National Interest in a Significant or Substantial Manner.

The phrase "furthers the national interest ... in a significant or substantial manner" is intended to emphasize "the need for an appellant to demonstrate that the proposed activity is of such import to the national goals for coastal resource management that, despite the will of the State and local government decision makers, the Secretary of Commerce should independently review the proposed activity to determine its consistency with the CZMA." Final Rule on Federal Consistency, 65 Fed. Reg. 77124, 77150 (Dec. 8, 2000). In evaluating whether a proposed project furthers the national interest in a significant or substantial manner, "the primary factors to be considered include the value of the project to furthering one or more CZMA goals . . . and the importance of the benefits derived from the project." *Islander East Consistency Decision*, at 6 n.26.

In its principal brief, Weaver's Cove argues that the Project furthers the national interest in a significant and substantial manner in that it (1) will be a major coastal-dependent energy facility that merits priority consideration under the CZMA; and (2) will develop the resources of the Nation's coastal zone by allowing its use for two purposes that previously were not available, namely, by importing LNG via marine vessels to meet growing regional demand and by improving an existing marine navigation channel to allow transit and berthing of vessels with a draft of up to 37 feet. WCE Br. at 9.

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[7] Weaver's Cove also claims "each of the concerns raised in the sources cited by MCZM has been fully addressed ... and have been determined not to affect the conclusion that 'if the project is constructed and operated in accordance with the conditions attached to [FERC's] approval, the Weaver's Cove project will be safe.'" WCE Reply Br. at 6. However, as shown herein, several conditions precedent of the Conditional Order related to safety and security have not been met, and are unlikely to ever be met, including reversal of the USCG decision that the waterway is navigationally unsafe for LNG tanker transit.

The first argument must fail because there is no evidence that the Project can comply with the conditions imposed by FERC to become a coastal-dependant energy facility, on which FERC's "public interest" finding was predicated.[8] As FERC itself clarified,

> We have found that the Weaver's Cove project will be in the public interest and be environmentally acceptable ***only if*** Weaver's Cove complies with the conditions set forth in the July 15 Order. We have conditioned Weaver's Cove authorization so that it cannot commence construction until the other agencies have completed their review of matters within their particular expertise and responsibility, ***thereby ensuring that the project will not proceed until there is satisfactory resolution of any remaining factors that could alter our finding*** that the project will not have significant environmental impacts.

Rehearing Order at ¶ 109 (emphasis supplied). Absent proof of compliance with the conditions precedent, the FERC certificate cannot be "effectuated" to develop a major coastal-dependent energy facility. *Id.* at ¶ 108.[9] Neither Weaver's Cove, nor Mill River make any attempt to show that the necessary conditions have been complied with or even can be complied with. As described in detail in the next section, not only do key conditions remain outstanding, but in certain circumstances, Weaver's Cove has abandoned attempts to satisfy the various federal and state resource agencies and has resorted to litigation.

Moreover, FERC's "public interest" determination with respect to LNG facility siting is colored by FERC's policy to let market forces influence and dictate which projects will succeed. *See* Conditional Order at ¶ 31 ("It has been Commission policy for well over a decade ... to permit the market to decide which projects are best suited to serve the infrastructure needs of an area."). FERC recognizes that scores of projects are proposed, but many receive FERC approval and yet never get built for a myriad of reasons. *Id.* ("Approval of a variety of projects benefits

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[8] The Department of Energy in its comment letter also argues that this element is met, but fails to consider the conditional nature of FERC's order, which the First Circuit Court of Appeals found too uncertain to warrant judicial review at this time. *Fall River*, 507 F.3d 1. Although the siting of energy facilities is an example of an activity that *could* significantly or substantially further the national interest, *see* Final Rule on Federal Consistency, 65 Fed. Reg. at 77150, it is not a forgone conclusion and the Secretary still must evaluate the entire record to make this determination.

[9] FERC gave Weaver's Cove and Mill River five years in which to satisfy the conditions and complete construction. Rehearing Order at ¶ 115(H).

the public by allowing it to choose which proposals offer the most attractive and timely service."). Just as FERC disclaims responsibility for selecting *the* project among competing proposals essential for the nation's energy security, its approval is likewise limited in impact. As FERC described in this case,

> Under section 3 of the NGA the Commission is charged with authorizing the siting, construction, and operation of LNG import facilities. Section 3 provides that the Commission shall approve such a project unless it finds that the proposal will "not be consistent with the public interest." The July 15 Order explained that it has been Commission policy generally to allow the market to decide which projects are best suited to meet the infrastructure needs of an area ....

Rehearing Order at ¶ 65. A finding by FERC that the Project is not inconsistent with the public interest is far different than proving the *national interest* is furthered *in a significant or substantial manner.* Weaver's Cove's and Mill River's reliance on the FERC decision as justifying the Project's importance to the national interest is misplaced.

Nor has Weaver's Cove made any attempt to demonstrate that the Project is in the *national interest* as opposed to the regional interest of New England. As FERC acknowledged on rehearing, there are several LNG projects designed to serve the New England market in addition to the existing, operating facility already located in the Massachusetts' coastal zone.[10] *See* Rehearing Order at ¶¶ 59-61. Here, FERC simply exercised its "less intrusive degree of regulation" to encourage "gas-on-gas competition" with respect to the market for LNG delivered by truck to peakshaving facilities, currently serviced only by the Everett facility.[11] *See*

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[10] As MCZM described in its brief, since the time of FERC's analysis both off-shore projects were approved and the Northeast Gateway (Excelerate Energy) project has been constructed. MCZM Br. at 27. Additionally, the Maritimes & Northeast pipeline expansion to carry vaporized LNG from Canaport LNG is expected to be operational later this year. These three projects would bring a combined additional capacity of between 1,700 and 2,100 mmcf/d to New England. *See also* Conditional Order, Commissioner Kelly Dissent at pp. 1-3 ("there are numerous gas infrastructure projects proposed to serve the New England region that present reasonable alternatives to the Weaver's Cove facility").

[11] Weaver's Cove's arguments that the Project will develop the Massachusetts coastal zone to "allow its use for a particular purpose that was previously not available" are belied by the fact that Massachusetts already supports one LNG facility in its coastal zone existing since the early 1970s, and two more off-shore facilities have been approved. *See* WCE Br. at 9. Weaver's Cove is not bringing a new and different industry to Massachusetts.

Conditional Order at ¶¶ 49-51. While gas-on-gas competition is arguably a laudable goal, it does not transform a Project with only limited, regional impact into something critical in the national interest. There is nothing in the record, except conclusory statements, to support an override of the State's objection by claiming this Project furthers a national interest in a significant and substantial manner.

Additionally, Weaver's Cove claims that the Project will develop the coastal zone by improving the federal navigational channel so as to allow ships with greater drafts to transit the channel. However, this argument ignores the fact that there is no need absent this Project to increase the depth of the federal navigational channel. Moreover, there is no evidence that ships with drafts up to 37 feet, as Weaver's Cove proposes, can safely navigate the channel between the new and old Brightman Street bridges.[12] Indeed, the USCG denied Weaver's Cove's request to approve its vessel plan finding the waterway "unsuitable from a navigation safety perspective for the type, size and frequency of LNG marine traffic associated with [Weaver's Cove's] proposal." *See* U.S. Coast Guard, Weaver's Cove Letter of Recommendation, Oct. 24, 2007. There is no national interest implicated by dredging in excess of the current federally authorized channel depth when the purpose is for the benefit of the Project proponents.

More importantly, as described by MCZM, it is antithetical to the objectives and purposes of the Coastal Zone Management Act to grant an override for a Project which the

[12] Although Weaver's Cove continues to seek approval for dredging to accommodate ships with a draft up to 37 feet, the ship design presented to the USCG and used in the MSI simulations had a draft of 34 feet and Weaver's Cove told MCZM "that it is simply too early for a final determination to be made as to the actual draft of the smaller LNG ships that will transit the Taunton River to the Weaver's Cove LNG terminal." Weaver's Cove Energy & Mill River Pipeline Response to Public Comments on the Coastal Zone Management Federal Consistency Certifications, p. 15 (March 30, 2007), WCE A-14. Even though Weaver's Cove told MCZM "that it is seeking USCG approval to use a range of ship sizes, with the use of larger vessels being conditioned upon the modification of the old bridge, or its removal," WCE A-14, p. 16, the USCG explicitly stated that it was not reviewing any proposal related to larger ships. *See* U.S. Coast Guard, Weaver's Cove Preliminary Assessment, Enc. (1), p. 5 of 14 (May 9, 2007), MCZM SA-14.

USCG found to be navigationally unsafe and impermissible.[13] "[U]tilization of coastal resources for economic and industrial development" must, at a minimum, satisfy all safety and security requirements. *See* WCE Br. at 9. Here, in addition to a determination that the waterway is navigationally unsafe, FERC found "that there remain a number of issues concerning ***the viability*** of emergency evacuation that have not yet been satisfactorily resolved." Conditional Order at ¶ 98 (emphasis supplied). FERC further ordered Weaver's Cove and Mill River "to develop emergency evacuation routes for the areas along the route of the LNG vessel transit" and an "Emergency Response Plan in coordination with state and local officials to ensure that a viable plan ***is possible***." *Id.* at ¶¶ 98-99 (recognizing that, at the time of the FERC decision, there was not yet a determination that the Project could be safely built and operated); *see also* Conditional Order, Commissioner Kelly Dissent, pp. 3-5 (the "project raises significant, unresolved safety issues" presenting "serious impediments to the development of a viable, effective Emergency Response Plan and evacuation plan in the area"). To date these requirements remain unfulfilled and "issues raised by Fall River [have not been] satisfactorily addressed in the Emergency Response Plan" as required by FERC. *See* Rehearing Order at ¶ 99.

The Secretary should deny Appellants' request for an override of MCZM's objection to federal consistency because they have not met their burden that the Project furthers the national interest in a significant and substantial manner. Indeed, at this time they cannot demonstrate that FERC's Conditional Order ever will become effectuated because key conditions precedent cannot be met. Lastly, Appellants cannot demonstrate that the requested "economic and industrial development" of the coastal zone can be safely and securely accomplished.

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[13] The Department of Energy misapprehends the impact of the USCG decision in its claim that "navigation suitability does not itself present an adverse coastal effect as contemplated by the CZMA." *See* Letter from David R. Hill to the Honorable John J. Sullivan, Response to NOAA's Request for Comments, Nov. 26, 2007, at 3.

B. The Adverse Coastal Effects of the Project Far Outweigh Any Alleged National Interest Furthered by the Project.

Assuming, *arguendo*, that the Secretary accepts Appellants' argument that the Project furthers the national interest in a significant or substantial manner, a Secretarial override of MCZM's objections nonetheless is inappropriate in this case because Appellants cannot establish the second element of Ground I. To satisfy the second element, the applicant bears the burden of demonstrating that "the project's adverse effects on the natural resources or land and water uses of the coastal zone are not substantial enough to outweigh its contribution to the national interest." Decision and Findings of the U.S. Secretary of Commerce in the Consistency Appeal of Vieques Marine Laboratories ("Vieques Consistency Decision"), May 28, 1996, at 11.

In considering the adverse coastal effects of a project, the Secretary considers the effects both separately and cumulatively. 15 C.F.R. § 930.121(b); *see also Vieques Consistency Decision*, at 11. To that end, the Secretary must consider "the project in combination with other past, present and reasonably foreseeable future activities affecting the coastal zone." *Vieques Consistency Decision*, at 11; Decision and Findings of the U.S. Secretary of Commerce in the Consistency Appeal of the Virginia Electric and Power Company ("VEPCO Consistency Decision"), May 19, 1994, at 21-22. Other activities that the Secretary considers include accidents and the improper conduct of an activity, not simply the best case scenario for the construction and implementation of a project. *See Mobil Oil Consistency Decision*, at 13. In addition, relevant factors in assessing the adverse impacts of a project include the duration of effects and the location of the activity and the area of impact. *See* Decision and Findings of the U.S. Secretary of Commerce in the Consistency Appeal of Jessie W. Taylor ("Taylor Consistency Decision"), Dec. 30, 1997, at 10.

Here, relying almost exclusively on the FERC FEIS, Weaver's Cove claims it has shown the adverse coastal effects are "insubstantial in magnitude and temporary in effect." *See* WCE Br. at 14. Weaver's Cove further claims potential adverse effects will be eliminated or mitigated "as required by the conditions of the Approval Order [the Conditional Order], which were based on recommendations set forth in the FEIS, and pursuant to mitigation plans developed as part of subsequent federal and state permitting reviews." *Id.* at 14-15. However, nowhere in the subsequent ten pages does Weaver's Cove show compliance with the Conditional Order, and nowhere does Weaver's Cove identify any completed federal and state dredging permitting reviews. Rather, Weaver's Cove repeatedly refers back to the FEIS and FERC's Conditional Order never acknowledging FERC itself recognized substantial ***unresolved*** concerns related to the significant dredging impacts. *See* Conditional Order at ¶ 106; Rehearing Order at ¶ 18. These unresolved concerns are precisely why FERC deferred to the federal and state resource agencies to either reach agreement and issue appropriate permits or deny the dredging.

As MCZM correctly noted in its brief, until the state permitting process was completed, MCZM remained uncertain whether the Project could comply with FERC's Conditional Order, including securing the necessary state water quality certifications under the federal Clean Water Act. *See* Rehearing Order at ¶ 115. Rather than complete that process, and actually confirm what it claims in this appeal, Weaver's Cove elected instead to sue both MassDEP and RI DEM seeking to avoid that review by claiming that the agencies had waived their rights to issue such certifications. *See Weaver's Cove Energy, LLC v. Rhode Island Department of Environmental Management, et al.,* United States Court of Appeals for the District of Columbia Circuit, No. 07-1235, consolidated with *Weaver's Cove Energy, LLC v. Massachusetts Department of Environmental Protection, et al.,* No. 07-1238 (pending). Absent final water quality certifications, Weaver's Cove and Mill River cannot meet their burden of showing the impacts to

water quality will be minor, temporary and adequately mitigated. *Cf.* WCE Br. at 18-21 (reliance on FEIS and related MEPA documents discussing *(i) Impacts from Deposition of Sediments, (ii) Impacts from Re-suspension of Sediment in Water Column,* and *(iii) Impacts from Re-introduction of Chemicals in Water Column).* Indeed, as the Response to Comments on 401 Water Quality Cert. Appl. indicates, some resource agencies seriously questioned the adequacy of the modeling and the results generated. *See* WCE A-14 at 67.

Simply put, the Conditional Order requires state-issued 401 water quality certifications to verify no adverse impact on state water quality. Weaver's Cove has not secured those certifications and therefore cannot meet its burden. Moreover, based on its recent litigation posture, Weaver's Cove does not intend to secure those certifications or demonstrate to the respective state agencies that state water quality standards are maintained. Just as FERC would not permit Weaver's Cove to bypass state water quality certification processes, the Secretary should not either. Compliance with the federal Clean Water Act and Clean Air Act has always been a requirement for CZMA approval, including Secretarial overrides. *See, e.g.,* Final Rule on Federal Consistency, 65 Fed. Reg. at 77151 ("NOAA will continue to seek the views and comments of the expert agencies charged with implementation of these statutes.").

Moreover, there is nothing in the Energy Policy Act of 2005 ("EPACT") which eliminates or undermines the importance of the state's shared regulatory authority under the federal Clean Water Act, Clean Air Act, and CZMA. Indeed, states' rights under these acts were expressly preserved and reaffirmed. *See* 15 U.S.C. § 717b(d). The legislative history demonstrates that the FERC's preemptive authority (including the FEIS) does not extend to a state's enforcement of its federally approved water quality standards or coastal zone management plan. During debate over the EPACT, Representative Gene Green acknowledged that the proposed legislation would retain state permitting powers: "States retain their authority to issue

or deny permits under federal statutes such as the Coastal Zone Management Act and the Clean Water Act." 151 Cong. Rec. H2399-04 (statement of Rep. Green).

In addition, the Chairman of FERC confirmed that the states' authority would be preserved under the proposed legislation. *See* 151 Cong. Rec. S6980-04 (2005). Senators Feinstein, Snowe, Reed and Sessions proposed an amendment that would require gubernatorial approval of any application regarding the siting of LNG facilities onshore or in state waters, similar to the authority granted to governors under the Deepwater Ports Act of 1974 for offshore projects. *Id.* Senator Feinstein expressed her concern that without such an amendment, states would not have veto power over siting onshore LNG terminals. In a letter dated June 14, 2005, FERC Chairman Pat Wood assured Senator Feinstein that by reserving state authorities under the CZMA, Clean Air Act, and Clean Water Act, the EPACT preserved state veto authority over proposed LNG projects. 151 Cong. Rec. S6980-04 (2005) (letter from Pat Wood, III, Chairman, FERC, to Sen. Feinstein) ("I believe the existing legislative provision in section 381 of the Senate bill (June 8, 2005) maintains current state "veto" authority over proposed LNG projects. While the bill appropriately clarifies the Federal Energy Regulatory Commission's exclusive authority to site LNG facilities that are onshore or in state waters, section 381 also specifically reserves state authorities under the Coastal Zone Management Act, the Clean Air Act and the Clean Water Act. As we discussed, state implementation of these Acts gives states a means to in effect "veto" proposed LNG projects.").

FERC's General Counsel also acknowledged the shared authority of the FERC and the states under the EPACT. In testimony before Congress, FERC General Counsel Cynthia Marlett responded to questions from Representative Boucher as follows:

> REP. BOUCHER: So the states still would have the authority to say no to the siting of an LNG facility if it deemed that such a siting was contrary to local environmental requirements.

> MS. MARLETTE: Right. Or if there were a coastal zone management conflict, they would be able to say no as well.
>
> REP. BOUCHER: So you're not seeking the authority to have a preemptive Federal permit that, once issued, would enable the facility to be sited, notwithstanding State objections?
>
> MS. MARLETTE: Correct.

The Energy Policy Act of 2005, Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce, 109th Cong. 31 (Feb. 10, 2005), at 54-55 (statements of Rep. Rick Boucher and Cynthia Marlette, Gen. Counsel, FERC). MCZM's objection based on lack of required approvals, including MassDEP's 401 water quality certifications, should not be overruled.

FERC also ordered Weaver's Cove to consult with and ***complete*** coordination with state and federal resource agencies concerning adequate compensatory mitigation plans. *See* Conditional Order, Conditions Nos. 19-21; Rehearing Order at ¶ 29. However, as described in the May 17, 2006 Responses to Comments, Review of Public Interest Factors and Compliance with Section 404(b)(1) Guidelines, WCE SA-7 at 20, 24, both the U.S. Environmental Protection Agency ("EPA") and the Department of Commerce, National Marine Fisheries Service ("NMFS") ***rejected*** Weaver's Cove's proposed mitigation plans as inadequate, including failing to provide compensatory mitigation for the filling of 0.56 acres of intertidal area where the new bulkhead is proposed, failing to adequately address the permanent loss of 11 acres of winter flounder spawning habitat, and failing to adequately address impacts on shellfish habitat.

To date there has been no agreement by the appropriate state and federal resource agencies on an adequate mitigation plan, a point which Weaver's Cove does not dispute.[14] Rather, Weaver's Cove chastises MCZM for reliance "on agency comments made several years

[14] *See* Response to Comments (March 30, 2007), WCE A-14 at 35 ("This version of the plan is the subject of ongoing discussions with the resource agencies and was prepared by Weaver's Cove ***as an offer*** for interagency review ...") (emphasis supplied).

ago" and claims all concerns "have been fully addressed" but fails to cite any documentation subsequent to the date of the comments, except its own repeated claims that what it proposed is good enough. That is simply insufficient to warrant a Secretarial override, especially here, where FERC's Conditional Order requires approval by the appropriate state and federal resource agencies. *See, e.g.*, Condition No. 20 ("Weaver's Cove shall complete the coordination with applicable federal and state resource agencies regarding development and funding of mitigation measures to offset impacts on quahogs resulting from dredging of the turning basin and file the results of that coordination, ***including copies of agency approval*** ..."); Condition No. 19 ("Weaver's Cove shall ... file ... the results of these consultations and the ***COE-approved*** Wetland Mitigation Plan...").

Next, with respect to time-of-year dredging restrictions, FERC recognized "[i]t is possible that the time of year restrictions ultimately imposed by the agencies would limit Weaver's Cove's annual dredging to a 75-day period between November and January." Conditional Order at ¶ 108. As indicated *supra*, DOI, through its Fish and Wildlife Service, filed comments with the Army Corps dated February 7, 2006 urging these extended restrictions to protect both upstream and downstream migrating fish in connection with its analysis under the Wild and Scenic River Act. *See* WCE SA-7 at 16-17. When Army Corps asked Weaver's Cove to provide details concerning implementation of such restrictions, Weaver's Cove responded that it "has not confirmed it is even feasible in terms of operational practice." *Id.*

Rather than attempt compliance, or risk rejection, Weaver's Cove filed suit against the DOI under the Wild and Scenic River Act claiming it was without authority to send the letter to Army Corps, and the earlier letter to FERC. *See Weaver's Cove Energy, LLC v. The United States of America, Department of Interior et al.*, United States District Court for the District of Columbia, Case No. 1:07-cv-01525 (RBW) (pending). Weaver's Cove avoids this critical fact

by discretely parsing select correspondence and claiming that its "mitigation measures and dredging restrictions are ***responsive*** to each concern" without ever stating they were determined to be satisfactory. *See* WCE Reply Br. at 11-13. Simply put, there has been no agreement by relevant resource agencies because, among other things, Weaver's Cove refuses to agree to extended restrictions recommended by state and federal resource agencies. In addition, Army Corps has not yet determined what, if any, additional restrictions it will impose. *See* Conditional Order at ¶ 108; Rehearing Order at ¶ 16.

Lastly, Weaver's Cove's argument that "[a]ny *additional* mitigation measures or conditions ... [will only] *further* reduce any remaining adverse coastal effects," WCE Reply Br. at p. 7, circuitously ignores the reality that absent compliance with the FERC Conditional Order, including agreement by the resource agencies on time-of-year restrictions, mitigation plans, and compliance with state water quality standards, the Project cannot be constructed and operated. These requirements are not further enhancements. As FERC made clear, they are threshold issues before the FERC certificate becomes "effectuated" and are necessary to support FERC's findings. *See* Rehearing Order at ¶¶ 108-109. Weaver's Cove and Mill River have failed to demonstrate compliance with the required conditions in the first instance so they may not rely upon FERC's finding that the Project can be constructed and operated in an environmentally acceptable manner.[15]

Under these circumstances, Weaver's Cove and Mill River cannot establish that any purported benefits of the Project to the national interest outweigh its adverse coastal impacts and, accordingly, the Appellants cannot demonstrate that the Project is consistent with the objectives

[15] Weaver's Cove's claim that the Secretary may rely upon implementation of conditions included in a permit misses the point. *See* WCE Br. at 14 n.8. Here, no dredging and water quality permits have been issued, which is why MCZM objected to the Federal Consistency Certifications.

or purposes of the CZMA so as to support an override of MCZM's consistency objection under Ground I.

C. Reasonable Alternatives to the Weaver's Cove Project Have Not Been Identified Because there Is Insufficient Information in the Record, but Alternatives Are Nonetheless Available.

Although it is the State agency's role to identify any alternative to a proposed project that "would permit the activity to be conducted in a manner consistent with the enforceable polices of the management program," 15 C.F.R. § 930.121(c), MCZM already has explained that such an evaluation was impossible because any evaluation of alternatives to the Project is conducted during the review of the various permit applications submitted by Weaver's Cove, which review had not been completed by the time MCZM submitted its principal brief. MCZM Br. at 25. Before that review was completed, MCZM was not in a position to identify any alternatives for the Secretary's consideration in this proceeding. This is yet another example of how Weaver's Cove's impatience in refusing a stay of MCZM's review period and in immediately appealing MCZM's objection to consistency brought a premature appeal before the Secretary and one in which the information in the record is insufficient to support an override by the Secretary.

Nonetheless, had Weaver's Cove waited for the appropriate permits to issue and allowed MCZM to complete its consistency review before undertaking this appeal, MCZM could have considered several alternatives to the Project, including the use of horizontal directional drilling for installation of the pipeline across the Taunton River, a smaller volume and footprint of dredging commensurate with smaller ships requiring less draft and turning area (assuming *arguendo* Weaver's Cove was ever able to secure USCG approval for any size ship transit), and/or more stringent time-of-year restrictions on dredging.

II. THE WEAVER'S COVE PROJECT IS NOT NECESSARY IN THE INTEREST OF NATIONAL SECURITY.

"A federal license or permit activity . . . is 'necessary in the interest of national security' if a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122. In deciding whether an activity satisfies Ground II, the Secretary gives considerable weight to "the views of the Department of Defense and other federal agencies with regard to whether the proposed project directly supports national defense or other essential national security objectives." *Millennium Pipeline Consistency Decision*, at 38 (citing 15 C.F.R. § 930.122). Here, the Department of Defense affirmed: "We are not aware of any national defense or other national security interest that would be significantly impaired if the project is not permitted to go forward as proposed." *See* Letter from Peter F. Verga to Brett Grosko, Response to NOAA's Request for Comments, Nov. 19, 2007.

Nonetheless, Weaver's Cove argues that the Project is necessary to "enhance domestic energy security." WCE Br. at 27. As the Secretary has emphasized, however, this standard requires a "*significant impairment* to a national defense or other national security interest if the particular project is not allowed to go forward *as proposed.* General statements that the project furthers or is important to the national interest fail to satisfy the requirements of Ground II." *Millennium Pipeline Consistency Decision*, at 39 (emphasis in original). Even the Department of Energy, which filed comments dated November 26, 2007 supporting the Project, does not try to argue that the Project is necessary in the interest of national security. *See* Letter from David R. Hill to the Honorable John J. Sullivan, Response to NOAA's Request for Comments, Nov. 26, 2007, at 1 n.1.

The applicant's burden in establishing that an override is warranted on the basis that the Project is necessary in the interest of national security is difficult. *VEPCO Consistency Decision*, at 53. Indeed, this burden is so difficult that where the Secretary has considered an appellant's argument on this issue, the Secretary never has concluded that a federal license or permit activity satisfies Ground II. Like all other applicants before it, Weaver's Cove fails to satisfy this difficult burden.

For example, in the *Millennium Pipeline Consistency Decision*, FERC indicated that the project would "'contribute to the region's energy security, a particularly vital national consideration at the present time." *Id.* at 38. The Department of Energy also stated that the project "is necessary in the interest of national security" and further "emphasized the project's importance to meeting increased energy needs of the northern United States." *Id.* at 39. Notwithstanding the project's contribution to the nation's energy supply, the Secretary concluded that these merely were the type of general statements that did not satisfy Ground II.

Similarly, in the *Mobil Oil Consistency Decision*, the Department of Defense recognized the long-term national security benefits of developing domestic energy resources. *Id.* at 38. Nonetheless, the mere fact that the applicant's oil and gas exploration efforts would contribute to the development of domestic energy sources was insufficient to support an override by the Secretary on Ground II. *Id.* at 39.

Weaver's Cove's and Mill River's claims in this appeal are no different, and no more specific, than those asserted in the appeals by the proponents in these two cases. In the same way that those applicants failed to show that the national security interest in stable and diversified energy supplies would be substantially impaired if their proposed projects were not allowed to go forward as proposed, so too have Weaver's Cove and Mill River failed to establish that any national security interest will be substantially impaired if the Project is not permitted to

proceed. Under these circumstances, Weaver's Cove and Mill River have failed to establish that the Project satisfies Ground II and accordingly, there is no basis to upon which to override MCZM's objections to consistency.

CONCLUSION

For the reasons stated herein, and in the State's principal brief, the Appellants' requests for Secretarial overrides should be denied. The Project does not further a national interest in a significant and substantial manner and is not necessary to national security. Weaver's Cove and Mill River have failed to comply with required conditions precedent to FERC's Conditional Order, including multiple environmental conditions, and thus cannot show that any purported benefits of the Project to the national interest outweigh its adverse coastal effects. Absent approval by the USCG, DOI, and the Army Corps, among other federal and state agencies, the Project cannot proceed. The Secretary should not override the State's objection when other necessary approvals have not been obtained, and may never be obtained.

Respectfully submitted,

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